

GENDER INEQUALITIES AND FAMILY SOLIDARITY IN TIMES OF CRISIS

Alain Laurent VERBEKE, Elisabeth ALOFS,
Christine DEFEVER and Dimitri MORTELMANS

Besides sociological, demographic and cultural determinants, also economic conditions can induce a shift in the social responsibilities of an individual, his family and society. Due to the current poor economic situation of most European countries, public funds are scarcer and the financial sustainability of public safety nets for those in precarious situations is at risk. That is why the financial crisis, topic of this book, has raised questions about which risks should still be covered by society and which risks could be covered via solidarity in private relationships and family law. Focusing on the socio-economic situation of women as one of the vulnerable groups, this chapter tackles the question whether a shift from public to private law protection can provide a solution for the limited public funds in times of economic crisis.

It is without doubt essential to our modern western society and identity, ever since the emancipation movements in the 20th century, that men and women are of equal value. This core value has been embedded in numerous legal documents, national legislation and international treaties.¹ Today's society however demonstrates some hypocrisy on two counts.

First of all, there are *foreign cultures* where women do not enjoy an equal legal position as men do and are not entitled to equal opportunities in education, work, career, leisure time, etc. Nevertheless many European countries have accepted in their midst the existence and flourishing of such cultures that fundamentally and conceptually discriminate against women. The mere fact that we accept such views to co-exist in our society, often for reasons of political correctness, is a denial of the very essence and core values of our culture and identity. Multiculturalism and integration cannot be achieved if we fail to claim respect for essential values such as the equal treatment of men and women. How respectful can the European culture be when it is too shy or cowardly to fight for one of its most fundamental

values? Respect for women starts with banning all rules and practices of female discrimination on our territory.

Secondly, although in our own *western culture* legal equality between men and women has been promoted as essential, western societies fail to operationalise that value in everyday life. In the first section of this chapter (1), sociological data are presented that demonstrate that *de facto* equality has not been achieved. For biological, social, psychological, traditional and other reasons, in day-to-day reality women continue to be 'second class citizens'. The 'glass ceiling' is a permanent challenge for women, on the labour market, in boards and in politics. Even more staggering is the weak position of women in their most intimate context: the relationship with their life partner. This precarious situation of women particularly causes problems when the relationship is disrupted by divorce or break-up, which is the case in more than fifty percent of relationships. The data demonstrate that the socio-economic position after a break-up is far more disadvantageous for women compared to their former male partners.

Notwithstanding those data, the law and particularly family law erroneously starts from the premise of equality between the sexes. This dogma of formal equality, together with emancipatory ideas, has led to the de-institutionalisation, individualisation and liberalisation of family law over the past decades. As will be described in the second section of this chapter (2), these trends have led to the abolishment of financial responsibilities within the family and to a lack of solidarity within family law. As mentioned before, this lack of solidarity mainly causes a problem when the family is disrupted by divorce or relationship break-up.

Given the persisting disparities between men and women in everyday life, the absence of responsibilities and solidarity in family law is questionable. Couldn't, or indeed shouldn't, family law pursue a protective role, which aims at compensating the actual differences between men and women which all too often lead to individual poverty, especially for women? As mentioned above, this question is even more urgent in times of economic crisis, as the sustainability of public safety nets is being queried. In the third section of this chapter (3), we therefore argue in favour of a more inclusive and equitable family law which recognises the existing differences between individuals, particularly between men and women. We aim to create a family law that tackles and adjusts the pernicious consequences of these inequalities.

1. GENDERED SOCIO-ECONOMIC INEQUALITY

The increased standard living conditions in nearly all western societies after World War II resulted in an enormous increase of female participation in the labour market. As a consequence, the dominant model of the male breadwinner of the fifties and sixties was slowly replaced by the dual-earner family, which became the standard for contemporary families.² Yet the relative dominance of these dual-earner families cannot conceal the fundamental gender disparities in paid labour and care within these households.

This first section starts with an overview of the socio-economic inequalities between men and women on the labour market and in the household (1.1). Next, we will look at the consequences of these inequalities when the family is disrupted by divorce or relationship break-up (1.2). We will see that the socio-economic position before and after a break-up is far more disadvantageous for women compared to the male partners.

1.1. SOCIO-ECONOMIC INEQUALITIES BETWEEN MEN AND WOMEN

In this section an overview of the labour force participation (1.1.1), wage and position (1.1.2) and career (1.1.3) inequalities between men and women will be presented. Subsequently, we will look at their position and responsibilities in the family and tackle imbalances in the division of household tasks and care between men and women (1.1.4).

1.1.1. Inequality in labour force participation

In general, women are less active on the labour market. Table 1 shows the percentage of women and men aged 15–64 years in Belgium who are working. The difference in employment rate between men and women has decreased over the years but still remains substantial. In 2012, almost 67% of men (aged 15–64 years) were working, compared to merely 57% of women.

Table 1. Evolution of employment rate in Belgium, by gender, 2000–2012, in %

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Men	69.3	68.8	68.3	67.3	67.9	68.3	67.9	68.7	68.6	67.2	67.4	67.1	66.9
Women	50.8	51.0	51.4	51.8	52.6	53.8	54.0	55.3	56.2	56.0	56.5	56.7	56.8

Source: ADSEI, Labour Force survey.

More striking are the gender disparities when looking at the part-time employment rate (table 2). Although part-time working has increased considerably over the past decade, there continues to be a major difference between women and men. In 2012, 43.5% of the women who were active on the labour market worked part-time. In the case of men, this was only 9%.

Table 2. Evolution of part-time employment rate in Belgium, by gender, 2000–2012, in %

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Men	4.3	4.7	5.1	5.8	6.3	7.1	7.0	7.1	7.5	8.2	8.4	9.2	9.0
Women	34.9	35.8	36.4	38.0	39.3	40.4	41.0	40.5	40.8	41.4	42.1	43.3	43.5

Source: ADSEI, Labour Force survey.

Apart from the plain percentages, there is also a major difference in the reasons why people work part-time. An analysis of a Belgian sample from the Survey on Income and Living Conditions (SILC) conducted in 2005,³ shows that only a small minority (1%) of men working less than 30 hours a week, mention household tasks or care as a reason to work part-time. This percentage is considerably higher among part-time working women (30%).

1.1.2. Inequality in wage and position

On average in 2013, a woman earned 10% less than a man per hour worked. Due to a large share of part-time working women, the pay gap rises to 23% on an annual basis. This raw gender pay gap can be attributed to a number of external factors. Only 26% of the gap is due to individual characteristics of the worker such as education, work experience, and years of service in the company. A dominant part of the gap can be brought back to gender segregation on the labour market (52% of the explained part of the gender pay gap).⁴ Women turn out to be over-represented in sectors, professions

and positions that pay less well. To a large extent, unequal pay is a question of unequal work.

Indeed, within the labour market differences between ‘female’ and ‘male’ professions and industries can be observed. So-called ‘female’ professions are systematically less well-paid in comparison with ‘male’ professions and industries. A major explanation for this difference lies in the perception society has of certain professions. Being a construction worker, for example, is considered as being a ‘tough profession’ meriting a higher wage. A geriatric assistant on the other hand is not considered to have a ‘heavy profession’ and therefore tends to be paid considerably less. Industries with higher-ranked positions are frequently more male-dominated than industries that are perceived to be lower (or ‘softer’). Studies have shown that the gender segregation on the labour market already starts when adolescents make subject choices in secondary school. Girls select themselves into lower-ranked sectors with worse payment and status.⁵

In addition, compared to men, the share of women in higher positions on the Flemish labour market is significantly lower than their overall share on the labour market.⁶ Not only are there fewer women in executive positions, their relative share according to positions in the labour market also decreases along the corporate ladder. Baerts et al.⁷ conclude from a large collection of studies that leading positions and promotions are far less reserved for women than for men. Women face the so-called ‘glass ceiling’ preventing them from achieving higher positions on the labour market, despite their abilities. Looking at the Belgian figures for 2010, only 34.1% of executive and higher management positions are occupied by women (ADSEI).

Not only are the positions on the labour market gendered, women also face inequalities within a similar position. Within the same profession, women have less extra-legal advantages, cost deductions, daily allowances, bonuses or double holiday allowance. Men also receive more flexible wage arrangements or sickness and hospitalisation insurance.⁸

1.1.3. Inequalities during career

As shown above, women do more part-time work than men. But during their life, they also use career breaks (maternity leave, time credit) more often. More than 66% of people taking a career break are women. This hegemony of women becomes even more apparent for full-time breaks and thematic leaves, such as parental leave, leave for medical assistance or leave for palliative care (respectively 77% and 72%). This percentage is lower for

part-time breaks (63%), where part-time options are gradually finding their way to men.⁹ The household and specifically the care of (young) children is the predominant motivation for these career decisions among women.¹⁰ For men, ending their career in a part-time schedule is clearly the most dominant reason. Alternatively, more men use their time out to try a new job or to start their own business.¹¹

The only reversed gender gap is found in research on the wage penalty of career breaks. In general, wage differentials between men with and without a break are much higher than between women with and without a break.¹² Men experience a larger drop in income after returning from a career break compared to women.¹³ In addition, wage growth for men is slower after they return from an interruption. In other words, the penalty for a career break in terms of wages is higher for men.

Apart from career breaks, women show greater variability and less stability in their careers, often resulting in more vulnerable positions. Entry into the labour market is often more difficult for women, causing a longer unemployment period before finding their first full-time position. They also switch more often between part-time and full-time jobs (often between different jobs). Men, on the other hand, have careers that show less variability and that are more stable and traditional, characterised by full-time jobs and easy job market entries.¹⁴

1.1.4. Inequalities within the household

The inequality on the labour market and in career paths finds its origin in the traditional division of labour in households. Different studies find that even when women work an equal share in the labour market, they still are confronted with a larger share of the responsibilities at home.¹⁵ In addition, part-time working women have a higher chance of being responsible for a dominant share of the household work, while the opposite is not true for households with part-time working men.¹⁶

The division of household work in families with children is even more unequal compared to childless households.¹⁷ Time-use research shows that, in a week, men spend seven hours more time on paid labour than women. Women spend eight hours and 35 minutes more on household work and an additional one hour and 35 minutes more on parenting and care for the children. In sum, the weekly work load of women in the household is three hours higher than that of men.¹⁸ In general, young, highly educated men with higher professional positions participate more in the household work.

Married men and men who work longer hours in paid labour help less. The most equal division of household work can be found in childless households where both partners work and where the woman has a significant share in the household income, and where both partners have a positive attitude towards equal gender roles.¹⁹

When families choose to decrease the working hours of one of the parents, women are usually the ones who step forward as it is predominantly women who face the dilemma of combining work and family life.²⁰ Indeed, the labour market participation of a family with children is 6.4% lower compared to a household without children. This difference is completely due to a reduction in working hours for women. A majority of working women decrease their activity after the birth of their first child. This reduction in working hours is a rarity among new fathers.²¹

This is not a value-free choice. The choice is inspired by traditional gender roles and societal expectations of the position of men and women in a family.²² Even among women themselves, the idea exists that it is the responsibility of women to take care of (young) children. It is a societal legitimization to reserve the caring role for women. There are signs that the classic breadwinner model is fading or at least revealing its pitfalls²³ but research from the Panel Study of Belgian Households shows that breaking the ruling social conventions is only marginally present among families.²⁴ Moreover, these decisions are not only value-driven. Another important incentive to tip the balance towards women is the wages of the partners.²⁵ The one earning less income has less bargaining power in the couple. The loss of income by reducing one's working hours is less for the one with the lowest income. Referring to the discussion of the gendered labour market above, men have higher positions and higher wages than their partners, even though the educational level of women has risen enormously.

1.2. SOCIO-ECONOMIC INEQUALITIES BETWEEN MEN AND WOMEN AFTER A RELATIONSHIP BREAK-UP

The previous section showed huge gender differences in caring for children. As a consequence, women are less active on the labour market. They work more part-time and less in managerial roles. Women are working in less well-paid industries and interrupt their career more often to combine work and family life. The result is that they have less social and economic capital and during the course of their life they accumulate fewer pensions rights than their partners.

The issue of these inequalities becomes apparent when the relationship ends in a divorce or a break-up. In this section, the consequences of relationship and labour market inequalities after the dissolution of the relationship will be analysed. Many findings show that women, again, are most disadvantaged, particularly when they end up as a single mother.

1.2.1. Inequalities in the division of care

A longitudinal study on register data revealed that the odds that women ultimately become the head of a single-parent household are four times higher than the odds for men. Other data shows that 13.1% of fathers head single-father households one year after the break-up while 50.6% of divorced men are single without children one year after. The opposite is true for women: single-mother households are found in 54.8% of cases while only 10.4% of women are single with no children after the break-up. Therefore, women with children prior to divorce have a much higher chance of becoming a single parent.²⁶

Not only do women have a higher chance of heading a single-parent household, they also stay longer in this type of household. It is found that 73.1% of the women who were single mothers at the end of the first year after divorce are still in this position one year later. For single fathers, this is only 62.9%. Four years after divorce the single mother percentage drops to 45.9% (31.4% for single fathers).²⁷

Moreover, women also have more children in their household compared to single fathers (mean of 1.3 children for women vs. 0.4 children among men). In addition, the age of the children is lower when they live with their mother (mean age of the youngest child is 9.5 years compared to 14 years when living with the father).²⁸

1.2.2. Inequalities in the financial consequences

Different longitudinal studies have shown that the financial situation of men is relatively stable or even improves after relationship break-up. For women, the evolution shows a negative trend in all studies. Their situation after a break-up only improves at a slow pace, taking a considerable number of years to overcome the financial consequences of divorce. Based on the Belgian Panel data from 1992 to 2002, men would see their OECD equivalised income (i.e. household income that takes into account the size of the household, and the number and age of children to allow for

comparison over different household types) increase by almost 5%. Women, on the other hand, face a decrease in equivalised income of 18.8%. When faced with a loss in income, it takes at least five years for 45% of women to reach their pre-divorce income level.²⁹

The evolution of income is determined by many factors. The height of the pre-divorce income determines the drop in income afterwards.³⁰ In addition, the relative contribution of the partners to the household income before the divorce is important for the post-divorce trajectory. When there are inequalities during the marriage, the financial consequences show one clear winner and one loser. Since men often earn a larger share of the household income, the drop in income for women is usually much greater. Suddenly, women need to run a household without the (higher) income of the partner. For a man, being a single breadwinner in a household, a divorce implies a financial gain. The more hours he works, the bigger the gain.³¹

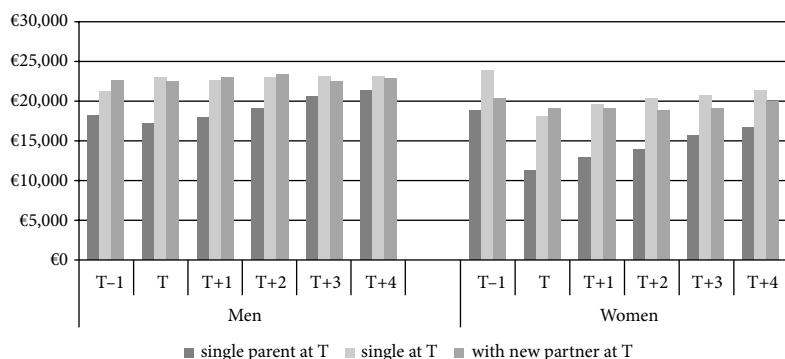
When children are involved, the custody arrangements determine to a large extent the financial consequences for the parents. The parent residing with the children is financially worse off. In particular, a higher total number of children and more young children increase the financial disadvantage. More children and younger children are factors that will have already influenced pre-divorce income (being lower) but the effect continues to be negative after the break-up. Having children has an effect on the family income of about 9% compared to households without children. Additionally, the wage gap increases by about 50%.

Re-partnering is held out as a successful strategy for women to counterbalance the negative financial consequences. For men, finding a new partner is shown to be less successful. One explanation for this difference is the labour market position of the new partners. The wage gap turns out to be negative for women. When a woman re-partners, the odds are higher that this will be accompanied by an increase in her total household income. For men, the odds are greater that a lower-earning partner will be found, which leads to a decrease in his total income.³²

The results from panel data were recently confirmed by a large-scale study on register data:³³ the financial drawback is biggest among women heading single-parent households after divorce. This is illustrated in figure 1. Stressing the financial consequences for women, we should not forget that there are also a considerable number of men who undergo a dramatic financial decline after divorce. Moreover, the subjective experience can also differ between divorcees. Transfers from one partner to the other ex-partner can trigger a more negative impression of the actual financial evolution.³⁴

One situation where this happens is when one partner is supposed to pay child support for the children or alimony to the ex-partner. The Belgian divorce law of 2007 restricts the duration of alimony payment (maximally to the duration of the broken marriage).³⁵ As a consequence, the most vulnerable group – mothers with young children from a short marriage – are allowed the least amount of alimony. The child support payments are freed from a time constraint. In literature, there is a disagreement about whether or not alimony and child support payments help people stay out of poverty.³⁶ A crucial question is also whether or not child support and alimony are actually paid (or can be paid).³⁷ Paying alimony seems to be closely related to the degree of initiative in breaking up the relationship and the degree of contact with the children afterwards.³⁸ Therefore, a positive effect of shared co-residence in the correct payment of transfers between former partners could be expected.

Figure 1. Evolution of the total gross yearly household (OECD and inflation corrected) for different family types in the year of the divorce (T, 2004), 2003–2008



Source: Data warehouse 'Labour market and social protection' – Crossroads Bank Social Security, own calculations.

2. ABSENCE OF SOCIAL RESPONSIBILITIES AND SOLIDARITY IN FAMILY LAW

The law, particularly family law, is dogmatically premised on the equality between men and women despite the existence within today's society

of undeniable gender differences. Because of this ‘formal’ equality, and together with the emancipation of women, family law has been subjected to trends promoting the individual. The disappearance of responsibilities and solidarity in family law is particularly noticeable in the form and content of intimate relationships (2.1), in the limited protection of the weaker spouse, often the wife, after divorce (2.2) and in the limited, almost absent, protection of unmarried partners, in particular when their relationship breaks down (2.3).

2.1. FORMAT OF INTIMATE RELATIONSHIPS

Last century’s emancipation of women has radically impacted the form and content of intimate relationships.

First, over the course of the last century, marriage has been transformed from a strategic alliance for family power and property interests into a private bond of love between two individuals who want to share their lives together. Whereas previously emphasis lay on the societal roles that marriage fulfilled – to wit, procreation, raising children, provision of material security to the family, protection of family property³⁹ – marriage is now seen as a private agreement based on love. And this ‘agreement’ must be able to be dissolved when such love ends.⁴⁰ This concept of marriage seems to return to some of the basic principles of the French Revolution, when the law relating to marriage was also based on affection, love and autonomy rather than on legal obligations and coercion.⁴¹ This change in the concept of marriage is characterised by a strong orientation toward self-determination and by an individual pursuit of satisfaction and inner harmony.⁴² This ‘de-institutionalisation’ of marriage goes hand in hand with a liberalisation and contractualisation of the law of divorce. Those defending marriage as an unassailable institution⁴³ have had to concede to those defending marriage as a revocable contract.⁴⁴

Secondly, over the course of the last two decades, marriage has rapidly lost its monopoly as the only possible format for a durable relationship. Secularisation brought the acceptance of many other models to organise one’s love life. Unmarried cohabitation has become the norm in many societies. At some points legislators intervened and offered a model of legally organised unmarried cohabitation. Often this was an answer to the demands of same-sex couples. Fortunately in many European jurisdictions same-sex couples now enjoy a fully equal treatment and can also choose to marry.⁴⁵

Autonomy and the freedom of choice have become the credo for many couples in organising their intimate relationships. However, this claim for autonomy may come with severe inconveniences in case of break-up, at least for the weaker party, who is usually the woman, as shown in section 1.

2.2. NO EFFECTIVE PROTECTION FOR MARRIED WOMEN UPON DIVORCE

The liberalisation of divorce law has reinforced the fragility of marriage. Love as the binding factor between spouses has led to less sustainable marriages than those based on property and social objectives.⁴⁶ The liberalisation of divorce law and the introduction of a 'right to divorce' in many European jurisdictions have increased the instability of marriage. This has led to the arrival of a new social risk, connected with the vulnerable family situation of a person.⁴⁷ The freedom to choose – in this case whether or not to remain married – creates today's divorce risk.⁴⁸

In most continental jurisdictions, matrimonial property law does not offer any protection for the weaker party upon divorce. Although the default system (the legal regime) in principle offers some protection and solidarity (e.g. community property or compensation mechanisms), spouses may contract out of this regime. They can do this by concluding a pre- or post-marital contract, such as a contract of separation of property. Here, the title (property) principle rules in its full glory. Each spouse owns the assets in his or her name, or his or her share in the joint assets. An entitlement to maintenance still exists for the weaker party upon divorce, when matrimonial property law fails to create a reasonable protection, but this entitlement was often reduced in time or in extent by the latest divorce reforms (e.g. the Belgian divorce reform in 2007).

Although this freedom of choice, the contractualisation of matrimonial property law and the right to divorce may nicely fit our modern society's need for autonomy of both spouses, acting as independent and free individuals, it does ignore the consequences of day-to-day reality of how many couples and households are organised. Although the freedom of choice argument is gender-neutral and applies to men and women, social reality teaches us that there is a greater risk of women being treated unfairly. Whatever one's moral opinion may be, one cannot deny after considering the data shown in section 1 that many couples do make a choice that allows the husband to fully invest in his professional career and that

does not allow the wife, in order to combine with children and household, to realise her full career potential.⁴⁹ She rather seeks a balance with family tasks. She then chooses another less demanding career (also less rewarding financially), or a nine-to-five job, a part-time job, a temporary career break, etc. The situation of women nowadays is often much more complex than in the old black and white days of housewives without any activity whatsoever on the job market. Today women juggle to keep all the balls in the air simultaneously. And very often it is the woman who reduces her career ambitions, picking a less demanding job and hence not fully realising her potential. Not surprisingly marriage for a professionally active woman in today's society has been qualified as a *Doppelbelastungsehe*.⁵⁰ She bears twice the burden, both at home and at her job.⁵¹ In addition to all of this, it seems to be common for women to spend their income on consumer goods while men tend to invest.⁵²

The choices women make in balancing work and family may be perfectly valid and sound during the marriage, in order for the couple and the family unit to find its private equilibrium, optimise their joint venture and realise their common dreams. A family policy that allows partners to agree on the division between income-generating labour on the one hand and care for the household and the children on the other can therefore be approved.⁵³ If the most necessary or efficient division of tasks would be to allow one type of task to be undertaken solely or mostly by one of the spouses, such a choice must be possible. Although economic independence may be stimulated by government, it need not be. After all, there are limits to the outsourcing of caring activities (the so-called *marketisation* of care) and parents often cherish a deserved desire to provide some of that care themselves.

Such choices may however come with devastating consequences upon divorce, resulting in one of the spouses receiving all of the assets and benefits and the other spouse being sent away with virtually no assets and the loss of a career and earning capacity.⁵⁴ In corporate law, regarding the relationship between business partners, many jurisdictions know the forbidden *societas leonina* where one partner takes all the profits and the other one just the losses. However, when the partners are not business partners (corporate law) but lovers (family law), this fundamental principle does not apply.

Given the adverse risks linked to a divorce, the introduction of a 'right to divorce' must not lead to the removal of responsibilities between spouses. On the contrary, it can be argued that the existence of a 'right to divorce' and an efficient and flexible divorce procedure justify a strengthened post-marriage solidarity. Whatever the decision of the spouses about the division

of labour during the marriage, the consequences thereof must be borne by both when the marriage ends.⁵⁵ After the dissolution of the marriage the economic self-reliance of each spouse will once again be the starting point, but this does not prevent the division of the economic advantages and disadvantages resulting from the division of tasks during marriage. When the income of the former spouses is insufficient, an appeal can be made to communal solidarity in the form of social security or social support. Communal solidarity must nonetheless remain subsidiary to the solidarity between the former spouses within private law to compensate the economic inequalities caused by the relationship break-up.⁵⁶

In Anglo-American jurisdictions this unfair situation is corrected through imperative law. The tradition of strict title (property) principle has been mitigated, as early as in the seventies of last century, by devices of equitable distribution of all sorts.⁵⁷ The judge can decide according to equity, as he thinks fit, to reallocate property and ignore title of assets. Moreover the judge must take into account a long list of statutory factors to justify such decision.⁵⁸ Although the weaker or poorer spouse does not enjoy a vested or secure entitlement but merely a possibility to participate in the marital wealth, the evolution in most US jurisdictions is towards a presumption of a 50/50 sharing of the marital gains.⁵⁹ And in England the recent case law of the House of Lords also points in this direction.⁶⁰ Continental legal systems as well seem to need a similar hard core protection through imperative legal provisions.

2.3. NO PROTECTION FOR UNMARRIED COHABITANTS

Another major flaw of traditional family law is that it does not take enough into account the social reality that many people live together unmarried.

In some jurisdictions unmarried cohabitants may register and enjoy a treatment similar to marriage. In other jurisdictions a semi-system exists. This is the case in Belgium with the rather peculiar system of legal cohabitation (articles 1475–1479 of the Belgian Civil Code), offering a limited set of rules.

Quite a number of unmarried partners live together in a *de facto* cohabitation that is not officially registered (although they may be domiciled at the same address and therefore enjoy several fiscal and social security benefits). For them no solidarity protection whatsoever is available. Matrimonial property law and inheritance law do not apply. All couples

who have an intimate conjugal relationship, but decided not to enter into marriage are subject to the common rules of contract and property, and contractual freedom. It is quite easy to picture the situation of the wife in the break-up of a seventeen-year cohabitation with three children. As to the property aspects, the strict separation of property rule applies, with all the consequences as described above. Very often, even a right to maintenance or alimony is not available.

3. CREATING A FAIR FAMILY LAW

Taking into account the established gender inequalities, the question arises whether there is justification to de-institutionalise and remove solidarity from family law as has been done over the past decades. Couldn't, or indeed shouldn't, family law pursue a protective role, based on compensating for the actual socio-economic differences between man and wife which all too often give rise to endangered livelihoods and individual poverty after the break-up of the relationship? As already mentioned, the necessity of private solidarity is a hot topic in times of crisis when public finances are scarce and the financial sustainability of public safety nets is called into question. In the following section, first we debunk the arguments which underlie liberal family law, namely the autonomy of will and the freedom of choice. Then we make a number of suggestions to come to a more solidarity based and fair family law; a family law that takes the existing gender inequalities as its starting point and strives to reduce the pernicious financial consequences that these inequalities lead to.

3.1. FALLACY OF AUTONOMY AND CHOICE⁶¹

The factual situations of married couples under strict separation of property (in jurisdictions without imperative corrections), and of unmarried cohabitants without a contractual arrangement establishing property solidarity, are very similar in the event of the break-up of the relationship. For many, scholars and courts alike, the situation of spouses under separation of property or unmarried partners does not present a case for discrimination, since they supposedly have opted for this regime and not for the system of marriage or the legal regime in marriage with its focus on solidarity and all its protective rules.⁶² It is a free and deliberate choice, so goes the argument.

So please accept the consequences of your choice. Do not claim rules you did not opt for. And certainly do not complain about discrimination.

In the following section, these arguments will be refuted. First we will consider the situation of the unmarried cohabitants (3.1.1) and then expand the analysis to those married under separation of property (3.1.2).

3.1.1. Unfairness for the weaker partner in unmarried cohabitation

The unmarried couple has made a choice not to be bound to each other. The choice was made not to be protected, to remain free. They had the choice to opt into the protective format of marriage. Yet they freely decided not to do so. Therefore, they should not get such protection. The general principles of the common law of contracts and property should be applied. This was their choice. Not applying specific principles of matrimonial property law, alimony law and inheritance law is the evident consequence of that choice. Hence this cannot be discriminative, as it is commonly said.⁶³

This emphasis and rather formal focus on marriage may surprise. Indeed, it has been argued that in most international human rights instruments, it is not so much marriage as an institution that is protected but rather the family as the basic unit of society.⁶⁴ In Australia the consequences of a relationship are not based on the ceremony of marriage but rather on the relationship of interdependence between the parties⁶⁵ (see also the concept of the ‘common law marriage’). Both elements invalidate the traditional choice argument: choice for marriage as such is not relevant and choice in itself is not an adequate frame because of the interdependence between the parties. We will formulate some arguments why the autonomy and choice argument in the context of marriage and matrimonial contracts is an inadequate and even erroneous frame.

3.1.1.1. No fully and adequately informed consent

First of all, for a choice to be binding in its legal consequences, it should be made with fully informed consent. It is very doubtful that married people have clear and sound knowledge about most legal regulations that govern the marriage. It is equally doubtful that unmarried couples would have explicit knowledge about the absence of such regulations in their case. It is naïve and unrealistic to assume that unmarried partners and spouses have a decent grasp of all of the legal consequences of living together or marrying.⁶⁶

In a case of the Canadian Supreme Court, Justice L'Heureux Dubé put it elegantly in her dissenting opinion:

'Most people are not lawyers. They are often not aware of the state of the law. Worse, many maintain positive misconceptions as to what obligations and rights exist in association with marriage and other relationships.'⁶⁷

'The fact that marriage gives rise to legal obligations does not, by itself, signal that the source of those obligations is a bargained-for exchange or the product of a consensus. While the price of a haircut is known in advance and can be contracted for (with a higher price for perms than for brushcuts), the same cannot be said about marriage.'⁶⁸

'If I am incorrect in concluding that the source of the obligations in the MPA (Matrimonial Property Act of Nova Scotia) is not based on the choice of marriage, it does not follow that heterosexual unmarried cohabitants enter into their relationships specifically to avoid those legal obligations. In other words, the choice argument fails from both sides: many unmarried partners do not choose to cohabit or remain unmarried so as to avoid the legal consequences of marriage.'⁶⁹

It therefore remains to be seen and proven that spouses and partners have made one or the other choice with an informed consent that is sufficient to qualify for a binding contract and to be bound by all of its consequences.

3.1.1.2. 'Will-deficiency' in love

Secondly, even with such full and complete information, one can doubt whether in fact a *free and autonomous choice* has been made at all. This is the point of interdependence of the parties as mentioned earlier. Picture the woman who has been informed of all the legal consequences and after four years of living together with a man and having his child, kindly asks him to marry her. The man however does not like the idea. He does not like the formalities. It is an old-fashioned establishment relic. And, 'honey, we don't need this. Our love is all that matters'. What can this woman do? It takes two to marry. So she cannot make the choice for marriage if he does not join her in that choice. Therefore she did not make the choice to avoid marriage, and she cannot be held liable for the choice which she did not make.

The counterargument could be that the woman effectively did make such choice not to marry, because she decided to stay in the relationship. It is her autonomy and decision to stay in the relationship or to leave. It is true that a rational actor could argue that given the wish of the woman to marry, the moment the man refuses to fulfil this wish, she should leave the relationship.

Since she did not decide to do so, one could argue that she has deliberately joined the choice of the man, which was not to marry. Therefore she also made the choice not to marry, and is bound by its legal consequences.

Here the reply might be that the choice to stay in the relationship and therefore not to marry, is not a free and autonomous choice. Given the intimate conjugal relationship and the fact that the woman loves the man, she has not made a free and deliberate choice. Her consent to that particular choice is 'poisoned', 'contaminated' or 'hindered' by her love. Maybe we should introduce a new *will-deficiency in love and romance* in concluding valid contracts.⁷⁰

Furthermore, her choice may also have been influenced by the presence of the child they have together. Would it not be in the interest of the child that its parents stay together as a couple? So the autonomy and will of the woman may have been impacted by the child's interest and fate. Her free will is deficient as is the case when a contract is made by mistake or under duress such as threat or force.⁷¹ Therefore, she did not make the free choice not to marry and cannot be bound by the legal consequences of such choice not made.

3.1.1.3. Not words but behaviour and actions count

How can we reconcile this with the perspective of the man? On his side, one can argue that he did make a free choice not to marry. Suppose he knew very well what he was doing. He was fully informed on all the legal ins and outs and the consequences of marriage, legal cohabitation and de facto cohabitation. Based on this information he made up his mind and with informed consent he decided the best choice was not to marry. He made a choice in favour of freedom, not being bound, being able to escape and getting out whenever he wishes to, with as low and cheap consequences as possible. Therefore his choice should be respected and legal consequences that are not those of his choice should not be imposed on him. This sounds like a strong argument, does it not?

Not really. It is correct that he may have said: 'I want freedom. I do not want to marry. I want to be able to end this relationship whenever I wish with no strings attached and with no responsibilities or liabilities'. And his actions may have been in line with his words in the very first months or even years of the relationship. However, at some point in time, his words have been overruled by his actions and behaviour.⁷² The longer he stays in the relationship, the more he commits to the common project, dreams, hopes

and lives together, the more his behaviour is inconsistent with his words. At some point, he reaches a tipping point: a point where his behaviour is so clearly and explicitly in contradiction with the words he once pronounced, that he cannot return to the freedom of his words anymore.

3.1.1.4. Point of no return

There is a wide margin of discretion and appreciation to define this tipping point of no return. It can be a multitude of elements, such as three years of living together, or having a child together, or the fact that a substantial contribution is made by one or by both partners to the relationship or in the sole interest of the other partner.⁷³ The concrete determination or defining criteria of the point of no return must be made in specific legislation. It will depend on the political process and it is an arbitrary choice. Hereafter we refer to unmarried cohabitation that has reached the point of no return according to a set of legal criteria to be agreed upon, as *durable cohabitation* or *conjugal cohabitation*.

What is not arbitrary but certain is that the point of no return is out there. We may debate its conditions, but not the principle itself. And once it is reached, there is no way back. Once the man has said A, but is overwhelmingly doing B, he should not be held to the consequences of A, but to the consequences of B.⁷⁴ This does not contradict his choice. For it is his behaviour and his own pattern of actions that constitute his choice. It is the choice of actions, the choice of life, which determines his responsibilities, not the choice pronounced in cheap words, one day, a long time ago.

From this point of no return, a protective format similar to the one of marriage and the legal regime with its focus on solidarity and all its protective rules (namely principles of matrimonial property law, alimony law and inheritance law) must be applied. Consequently the harsh principles of the common law of contracts and property will be corrected through imperative rules with a protective role.

3.1.2. Unfairness of matrimonial contracts of strict separation of property

At the moment of conclusion of the matrimonial contract, often a pre-nuptial agreement, both spouses agree on the words of a contract for full autonomy and independence. Upon divorce, even after fifteen or twenty years of marriage and two or three children, the property relationship

between the spouses is governed by these strict words. The inequities and unfairness of the title principle, leaving the vast majority of the assets to the husband, do not seem to overrule, for Belgian and many continental courts, the words of the original contract. The situation is very different from the Anglo-American approach.

The defenders of contractual autonomy and legal certainty produce again the choice argument. Both spouses made a choice for separation of property and they should respect it.

It is striking to observe such vigorous defence of contractual autonomy while in other areas of law, such as labour law or consumer law, numerous imperative rules protecting the weaker parties allow the overruling of contractual arrangements.⁷⁵ It is difficult to understand why the development of contract law for consumers into a protective format whereby a signed contract may even be revoked unilaterally within a fixed period, would not be equally applicable in long term contracts between intimate partners. For the advocates of contractual autonomy, apparently employees and consumers deserve more protection than spouses.

3.1.2.1. Fully and adequately informed consent

The choice fallacy claims that the spouses were fully informed, by the notary, about the consequences and risks of the separation of property. With that knowledge they made the choice for that contract and now, upon divorce, they must just live by the consequences of that choice and accept them.

We can challenge this choice dictate with the same arguments as above. Even with full information about the legal rules, did they really understand the concrete consequences of all these rules? Could they imagine the impact of the arrival of children and the ensuing effect on the organisation model, responsibilities and task divisions in the family? As for all long term contracts, it is difficult to predict all events coming up and all surprises of life. People may lose their jobs, a spouse may get sick, children may have social or psychological problems, etc.

The minority opinion of Justice L'Heureux Dubé in the quoted Canadian decision, is again illuminating:

‘The marital relationship changes over time. Houses and other assets are bought and sold, one of the partners is promoted or loses their job, children are born, accidents occur, or a member of the family becomes ill. These and other events

are rarely anticipated at the outset and appropriately bargained for. Further, neither spouse can anticipate who will contribute what to the marriage. As a consequence, even the most intelligent of adults lack the capacity to evaluate the commitments involved in any agreement dealing with the consequences of a dissolution that will only come after great change occurs in the relationship.⁷⁶

Fully informed consent to agree with a contract of strict separation of property requires information.⁷⁷

First of all, the information must be complete and comprise the full picture of the legal rules, including the alternatives. A common reason for spouses under Belgian law to opt for a separation of property is the overkill creditor protection of the community regime in case of professional debts.⁷⁸ Offering the strict separation of property as the solution for this creditor risk is not giving full information.⁷⁹ The full picture includes explaining that one indeed needs a contract of separation of property to counter that risk, yet not a contract of strict separation. One can perfectly mitigate the creditor risk with a contract of separation with a 50/50 participation clause in the marital gains.

Secondly, the information should not merely be about the legal rules but also explain the very concrete consequences and possible risks of these rules in different scenarios. Therefore it is vital to ask the wife whether she understands that such contract and its principles of autonomy may result in a scenario where she is depending on maintenance upon divorce after twenty years. So the story goes:⁸⁰

‘A woman, a successful lawyer, quits her job and the junior partner track in her law firm, only after three years of marriage because of the work with their two children. She would work part-time in a notary’s office, earning about ten times less. All her time would be devoted to raising the children, organising the household and supporting her husband. He would need that, being an intern at the local hospital with the ambition of becoming head of department. Many evenings of listening to him, reassuring and helping him, hosting dinners for the hospital’s Board of Directors. Feeling independent, she would be using her small salary to pay the groceries and the kids’ stuff. The house in Brussels and later the house at the beach in Knokke would be bought with the husband’s management company. All would go rather well for a couple of years, however she would not be able to continue working at the notary’s office because of the youngest son’s learning disorder. He would need all the help and assistance of his mother. But she would be happy, knowing that she and her husband would be in it together, for better and for worse. And then she would be so surprised, after twenty years, to learn that her husband needed some space, and that a new

young and beautiful doctor of 27 at the hospital was helpful in giving him some extra oxygen. And then he would ask her to live by the rules of their contract of autonomy and independence, and apply the title principle. The house and apartment would be his, also the stock portfolio and the Porsche. The VW Golf and one small bank account would be hers. And of course he would pay maintenance for the children and also for her, for a couple of years until she finds a new job.'

If the wife receives this kind of full and realistic information, chances are high that she will not make the choice for the strict separation of property.

This is why we need to stimulate much more open communication and negotiation before the marriage about the possible matrimonial contracts.⁸¹ Such negotiation may and should empower the weaker party, often the woman, helping her to discover and assert her own legitimate interests. She must overcome the romantic idea that, although he insists on strict separation of property, he means so well.

And even if the weaker party does agree with the strict separation of property, the question remains whether it has been a free and autonomous choice, as explained above concerning the choice to marry or not. It also takes two to agree to a marital contract.

3.1.2.2. Not words but behaviour and actions count from the point of no return

The fundamental idea of freedom to act but being held responsible for those acts also counts in the context of matrimonial contracts of strict and pure separation of property. How can a civilised society accept to only look at the words of twenty years ago? Here too, the reasoning should be that both spouses thought and assumed they would organise their partnership in full equality, autonomy and independence and therefore opted for these words. However over the years they may have shaped their joint venture in a totally different way with a role and task division that became much more complicated than ever assumed and often with a huge contribution of one of the partners, mostly the wife, to the household and the children. Thereby, she is sacrificing, at least partially, her own earning capacity and career potential. The couple's behaviour and actions in that case have overruled the words of the contract. Although they agreed to A in words, the choices they have made over the years through their actions were for B, and it is to B they should be held. As long as both spouses have contributed equally to the partnership, in all kinds of relevant ways, they should share equally in the

marital gains or partnership assets. Why would one contribution, working on the labour market, be exclusively decisive? Therefore, also for married couples who have chosen for strict separation of property, there should be a point of no return where contractual autonomy is replaced by a protective format of imperative rules with a focus on solidarity.

4. CONCLUSION

A discrepancy exists between the ideal image of an emancipated and individualised society where each individual is financially independent, on the one hand, and the socio-economic reality on the other. Even if complete financial dependence between spouses is no longer the starting point when living together, a certain level of income dependency remains. Upon entry into a relationship, whether or not within a marriage, an economic unit is created which leads to dependency between the partners caused by the division of tasks and income within the couple. Women in particular remain dependent on a degree of ‘income sharing’ in a relationship, because they – more often than men – work part-time, make use of the system of career breaks or continue to work full-time but curtail their career prospects and choose a so-called nine-to-five job so that they can take on caring tasks. This division of activities and choices within a relationship still leads to inequalities between men and women in the labour market as well as in their respective earning capacities. As a result, divorce or relationship break up continue to go hand in hand with a loss of prosperity and higher risk of poverty, especially for women.

The legal protection of a partner upon the dissolution of a relationship seems to be insufficiently attuned to today’s society. Due to the economic crisis, public funds to cover this risk are scarce. We advocate that a shift from public to private law protection is needed.

In most western legal systems, family policy and family law legislators have, with some success, focused on realising the ideals of freedom and equality. In contrast, the ideal of fraternity has been neglected. The role of solidarity in provisions relating to co-habitation has been eroded. Yet a balance between these three revolutionary ideals is essential. The neglect of one of the three principles (in this case fraternity or solidarity) will in the longer term be detrimental to the other two (that is equality and freedom). The legislator too often assumes the economic self-reliance and equality of the partners, and pays too little attention to the financial consequences of

the breakdown of a relationship. It is remarkable how little importance the legislator attaches to the economic impact that co-habitation, and marriage in particular, has on some people, primarily women and children.

Moreover, we must emphasise the advantages that the government gets from promoting and supporting relationships, such as marriage, at times of economic crisis. A relationship between partners is the 'cheapest' and most efficient way to guarantee the livelihood of an individual, namely by placing the responsibility for that economic security with another individual, the partner. In a partnership the social and other risks that may befall an individual are dealt with communally. Given the financial limits of the social security system and the welfare state, the benefit of such private partnerships should not be underestimated. At the peak of the welfare state, a reduction of family solidarity was forecasted, but we must now realise, at a time of ever-increasing economic and financial difficulties, that the opposite is true. The family must be once again held responsible for guaranteeing the livelihood of the individual. Family law needs to shape this solidarity and make it a reality.

In this chapter some suggestions have been made to come to a more solidarity-based and fair family law, that takes the existing gender inequalities as its starting point and strives to compensate for the pernicious financial consequences that these inequalities lead to. We had a particular focus on the precarious situation of unmarried cohabitants and spouses married under separation of property.

First, the necessity of more open communication and transparent and informed negotiation about the consequences of the choice to marry or not, and under which regime, was emphasised. Such negotiation should empower the weaker party, often the woman, helping her to discover and assert her own legitimate interests.

Secondly, the idea of freedom to act yet being held responsible for those acts was promoted. On each relationship with a certain degree of interdependence, a protective format with a focus on solidarity should be applied. From the so-called 'point of no return', the autonomy of will and the freedom of choice of the partners not to be in a relationship characterised by solidarity could be overruled by imperative corrections to protect the weakest party. Criteria to define the point of no return can be: three years of living together, or having a child together, or the fact that a substantial contribution is made by one or by both partners to the relationship or in the sole interest of the other partner. An example of such an imperative correction to the autonomy of will and the freedom of

choice is the equal division of the marital gains or partnership assets when both spouses have contributed equally to the partnership in any relevant way.

Endnotes

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